Heinemann v. Computer Associates International, Inc., No. 04-56234

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent from part I, the majority's determination that the district court erred in granting summary judgment in favor of Computer Associates on the retaliation claim. I concur in parts II and III.

In order to meet her burden, Heinemann must provide evidence which, when viewed in the light most favorable to her, proves 1) that one of the individuals involved in the decision to fire her was knew of her whistleblowing activity; 2) that the firing was motivated by it; and 3) that this animus was a "but-for" cause of the decision to fire her.[1]

In this case, in light of the overwhelming evidence that Computer

[1] See McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n.10 (1976) (in proving that the reason for firing the employee was a pretext, "no more is required to be shown than that [the protected action] was a 'but for' cause" of the discharge); Reeves v. Safeway Stores, Inc., 16 Cal. Rptr. 3d 717, 726-27 (Cal. Ct. App. 2004) ("The issue in each case is whether retaliatory animus was a but-for cause of the employer's adverse action....the plaintiff can establish the element of causation by showing that *any* of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a 'but-for' cause, i.e., a force without which the adverse action would not have happened.").

Associates offered to prove that Heinemann had forged the signature of a client on a sales contract, it is impossible to believe that Heinemann's complaint to the California Department of Fair Employment and Housing (DFEH) was a "but-for" cause of her termination.[2] It seems clear that even if Heinemann had not filed a complaint with DFEH, she would have been terminated on the basis of the evidence of her forgery.[3] She should not be able to protect herself from termination on the basis of stealing from her employer simply by filing a

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[2] The majority minimizes the evidence that Heinemann had in fact forged the signature on the contract. Besides proof that the signature had been cut and pasted onto the fax from another document, the investigator discovered: 1) that the person whose signature appeared on the contract as "Director of Data Processing" had not held that position for several years, 2) that the company in question had received a proposed contract from Heinemann, but had not yet forwarded it to the appropriate person for consideration, 3) that Heinemann had vouched for the signature by saying that she was familiar with the individual who had signed the contract and knew why he had signed it rather than the company's president, 4) that all signatures on the document appeared identical even though there were several signatures across several different pages, and 5) that the signature appeared to have been taken from a 1993 contract when a comparison between the two documents was done.

[3] The majority also suggests Computer Associates might have kept Heinemann on, even after discovering that she was cheating on her quotas and commissions. This assertion is not supported by anything in the record. Heinemann did not offer evidence that the company had kept other employees suspected of this type of misconduct on the payroll and it is not so common for a company to do so that we should just assume it on her behalf. Grace Caden, Senior Vice President for the Internal Audit department, who knew nothing of Heinemann's complaint to DFEH, stated in her declaration that falsifying a contract was specifically against company policy and grounds for termination.

complaint with a government agency. The Supreme Court has explained that Title VII does not require a company to employ an individual who has engaged in unlawful activities against the company,[4] nor do employment laws compel any such outcome.

While the majority is correct to say that the burden has shifted back to Heinemann to prove that Computer Associates's reason for firing her was a mere pretext, it is incorrect in holding that she has offered sufficient evidence to prevent summary judgment against her on this issue. The employer provided proof that her superiors found out that she had forged a nonexistent contract, which would generate an unearned sales commission. There is no evidence from which a reasonable jury could conclude that this discovery was a mere pretext for firing Heinemann.

[4] See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973) ("Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.").